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BEFORE THE DEPARTMENT  
OF NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT ) FINAL ORDER  
NO. 50272-g42M BY JOSEPH F. )  
CRISAFULLI )

\* \* \* \* \*

The time period for filing exceptions to the December 4, 1986 Proposal for Decision in this matter has expired. No timely exceptions were received from any party of record. Therefore, the Department accepts and adopts the Findings of Fact and Conclusions of Law of the Hearing Examiner as contained in the September 11, 1984 Interlocutory Order and incorporated in the Proposal for Decision, and incorporates them herein by reference.

Based upon the Findings of Fact and Conclusions of Law, and all files and records herein, the Department of Natural Resources and Conservation makes the following:

ORDER

Application for Beneficial Water Use Permit No. 50272-g42M by Joseph F. Crisafulli is hereby denied.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a

**CASE # 50272**

petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 4 day of March, 1987.



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Gary Fritz, Administrator  
Water Resources Division  
Department of Natural Resources  
and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620-2301  
(406) 444 - 6605

**CASE # 50272**  
- 2 -

AFFIDAVIT OF SERVICE  
MAILING

STATE OF MONTANA                    )  
  ) ss.  
County of Lewis & Clark )

Sally Martinez, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on March 4, 1987, she deposited in the United States mail, first class postage prepaid, a Final Order by the Department on the Application by Joseph F. Crisafulli, Application No. 50272-g42M, an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

Joseph F. Crisafulli  
Box 1354  
Glendive, MT 59330

Marie & Monte Jarvis  
607 E. Dodge St.  
Glendive, MT 59330

Basta Ranches  
James A. Basta  
Rt. 2, Box 331  
Savage, MT 59262

Emil Diede, Inc.  
Emil Diede, Pres.  
Savage, MT 59262

Lawrence R. Sturgis  
500 Grant  
Glendive, MT 59330

Barone Ranch, Inc.  
Douglas E. Barone  
Box 555  
Glendive, MT 59330

Hatfield & Raudsep, Inc.  
Box 339  
Joliet, MT 59041

Tom Hafele  
Intake Rt.  
Glendive, MT 59330

Robert Hubing, Inc.  
Box 339  
Joliet, MT 59041

M.L. Murray  
Box 193  
Lambert, MT 59243

Lester H. Miller  
Rt. 2, Box 300  
Savage, MT 59262

Herbert F. Allard  
Savage, MT 59262

Lewis C. Murray  
Savage, MT 59262

Fred, Warren & Walter Prevost  
Intake Rt.  
Glendive, MT 59330

Joe Michelett  
Rt. 2, Box 235  
Savage, MT 59262

William Struckman  
Savage, MT 59262

Theodore Johnson  
104 So. Rosser Ave.  
Glendive, MT 59330

George Rice, Jr.  
Intake Rt.  
Glendive, MT 59330

CASE # 50272

Mildred K. Allard Spithoven  
Savage, MT 59262

Marjorie M. Murray  
Rt. 2, Box 364  
Savage, MT 59262

Elwin Prevost  
Rt. 2, Box 315  
Savage, MT 59262

Sharon P. Allard  
1408 N. River Ave.  
Glendive, MT 59330

Richard L. Allard  
Rt. 2, Box 3078A  
Forsyth, Mt 59327

Verna Allard  
1408 N. River Ave.  
Glendive, MT 59330

Eugene P. Allard  
2733 Miles Ave.  
Billings, MT 59102

Rodney L. Sturgis  
RR 2  
Savage, MT 59262

Rich Brasch, Supervisor  
DNRC Hydro Sciences Section  
(hand-deliver)

Sterling Sundheim  
Water Rights Bureau  
Field Office Manager  
Glasgow, MT  
(inter-departmental mail)

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Sally Martinez

STATE OF MONTANA )  
 ) ss.  
County of Lewis & Clark )

On this 4th day of March, 1987, before me, a Notary Public in and for said state, personally appeared Sally Martinez, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judy Lohr  
Notary Public for the State of Montana  
Residing at Helena, Montana  
My Commission expires 3-1-88



E.B.

IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT ) PROPOSAL FOR DECISION  
NO. 50272-g42M BY JOSEPH F. CRISAFULLI )

The Findings of Fact and Conclusions of Law of the Hearing Examiner, as set forth in the September 11, 1984 Interlocutory Order in this matter, are incorporated by reference in this Proposal for Decision. Based upon these Findings of Fact and Conclusions of Law, and upon the Memorandum below, the Department makes the following:

Application for Beneficial Water Use Permit No. 50272-g42M by Joseph F. Crisafulli is hereby denied.

Gary Fritz, Administrator  
Water Resources Division  
Department of Natural Resources  
and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620-2301  
(406) 444 - 6605

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto

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with the Department (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA § 2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed. Any adversely affected party has the right to present briefs and oral arguments before the Water Resources Administrator, but these requests must be made in writing within 20 days after service of the proposal upon the party. MCA § 2-4-621(1). Oral arguments held pursuant to such a request will be scheduled for the locale where the contested case hearing in this matter was held, unless the party asking for oral argument requests a different location at the time the exception is filed.

Parties who request oral argument are not entitled to present evidence that was not presented at the original contested case hearing: no party may give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the information which already is present in the record.

#### MEMORANDUM

A hearing in the above-entitled matter was held in Glendive, Montana, on March 29, 1984. An Interlocutory Order was issued on

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September 11, 1984, containing all Findings of Fact and Conclusions of Law necessary to reach a decision in this matter.

The Interlocutory Order found that the Applicant had met his statutory burden of proof on all of the criteria specified in MCA § 85-2-311 (1983), with exception of § 85-2-311(a) and (b), which require substantial credible proof of water availability and lack of adverse effect to the water rights of prior appropriators. The Hearing Examiner allowed the Applicant an opportunity to develop the proof necessary to meet his statutory burden, rather than denying the Application, however, since the record indicated that a period of testing would not act to the detriment of the Objectors, and that the specified testing most probably was the sole reliable means by which information necessary to meet the Applicant's burden of proof could be obtained. (See the Memorandum to the September 11, 1984 Interlocutory Order.)

The Applicant was granted an Interim Permit, valid through October 1, 1986, for the purpose of obtaining data on the probable effects on Burns Creek of the proposed appropriation; that is, he was granted an opportunity to sustain his burden of proof on the issues of the availability of unappropriated water and the possibility of adverse effects to the water rights of prior appropriators.

The Applicant drilled a well pursuant to the Interim Permit in this matter, but failed to install the required surface flow monitoring devices and carry out the necessary testing before the Interim Permit expired. (See November 6, 1986 Memorandum by Vivian Lighthizer; November 14, 1986 Memorandum by Peggy A. Elting.)

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As the Interlocutory Order clearly states, the Department cannot issue a beneficial water use permit in the absence of the specified testing, "due to the complete lack of credible data on the probable affects on Burns Creek from the proposed use." (See September 11, 1984 Interlocutory Order, page 20.) Therefore, the Application in this matter must be denied.

The September 11, 1984 Interlocutory Order specified that the parties in this matter would be given an opportunity to present further evidence on the issues of adverse effect and water availability once the Interim Permit had expired and the flow monitoring data was available. However, since the flow monitoring has not been done, there is no need for further discussion of these issues: the Applicant cannot sustain his burden of proof on these issues, since he has failed to provide the data which the record indicates is the only reliable means of predicting stream depletion. (See Memorandum to the September 11, 1984 Interlocutory Order in this matter.) Since the Application is denied, the Objectors do not need an opportunity to present further evidence.

CASE # 50872

DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION



TED SCHWINDEN, GOVERNOR

1520 EAST SIXTH AVENUE

STATE OF MONTANA

DIRECTOR'S OFFICE (406) 444-6699

HELENA, MONTANA 59620

TO: Department File on Application for Beneficial Water  
Use Permit No. 50272-g42M by Joseph F. Crisafulli

FROM: Peggy A. Elting, Hearing Examiner *RE*

SUBJECT: Memorandum on telephone conversation with Joseph F.  
Crisafulli

DATE: November 14, 1986

On the afternoon of November 14, 1986, I telephoned Joseph F. Crisafulli at his home to verify Glasgow Field Office Manager Vivian Lighthizer's understanding that the flow monitoring required by the September 11, 1984 Interlocutory Order in this matter had not taken place. (See November 6, 1986 Memorandum from Vivian Lighthizer to Ron Guse.)

Mr. Crisafulli stated that a well has been drilled, and the well log report is expected to provide some information, although a decision has not yet been made as to whether the well will be used for production.

Mr. Crisafulli confirmed the fact that the flow monitoring devices had not been installed, nor had the required monitoring and record-keeping taken place.

I told Mr. Crisafulli that the Interlocutory Order made it clear that the grant of a Provisional Permit in this matter was contingent upon evidence to be gathered using the Interim Permit, and since the Interim Permit had expired on October 1, 1986, and no testing has been done, that the Department had no basis upon which it could grant the Applicant a Provisional Permit.

Mr. Crisafulli asked what action would have to be taken if he decides to continue with his proposed appropriation. I informed him that he most likely would have to re-apply for a beneficial water use permit. In response to his question as to whether he would have to go through the whole process over again, I told him that most likely the Department would take administrative notice of the information in the present record so that the same material would not have to be re-discussed, if

**CASE # 50272**

CENTRALIZED SERVICES  
DIVISION  
(406) 444-6679

CONSERVATION DISTRICTS  
DIVISION  
(406) 444-6667

ENERGY  
DIVISION  
(406) 444-6677

OIL AND GAS  
DIVISION  
(406) 444-6675

WATER RESOURCES  
DIVISION  
(406) 444-6637

Mr. Crisafulli makes another application for substantially the same project as the one specified in the present matter.

Mr. Crisafulli asked to have the Department's decision in writing. I told him that he would be receiving a Proposal for Decision in this matter, and that I would send him a copy of the present memorandum documenting our telephone conversation.

AFFIDAVIT OF SERVICE  
MAILING

STATE OF MONTANA                    )  
  ) ss.  
County of Lewis & Clark    )

Sally Martinez, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on December 5, 1986, she deposited in the United States mail, first class postage prepaid, a Proposal for Decision by the Department on the Application by Joseph F. Crisafulli, Application No. 50272-g42M, an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Joseph F. Crisafulli, Box 1354, Glendive, MT 59330
2. Basta Ranches, James A. Basta, Rt. 2, Box 331, Savage, MT 59262
3. Lawrence R. Sturgis, 500 Grant, Glendive, MT 59330
4. Hatfield & Raudsep, Inc., Leida E. Hubing, Pres., Savage, MT 59262
5. Lester H. Miller, Rt. 2, Box 300, Savage, MT 59262
6. Lewis C. Murray, Savage, MT 59262
7. Joe Michelett, Rt. 2, Box 235, Savage, MT 59262
8. Robert Hubing, Inc., c/o Robert Hubing, Savage, MT 59262
9. Theodore Johnson, 104 So. Rosser Ave., Glendive, MT 59330
10. Marie & Monte Jarvis, 607 E. Dodge St., Glendive, MT 59330
11. Emil Diede, Inc., Emil Diede, Pres., Savage, MT 59262
12. Barone Ranch, Inc., Douglas E. Barone, Box 555, Glendive, MT 59330
13. Tom Hafele, Intake Rt., Glendive, MT 59330
14. M.L. Murray, Box 193, Lambert, MT 59243
15. Herbert F. Allard, Savage, MT 59262
16. Fred, Warren & Walter Prevost, Intake Rt., Glendive, MT 59330
17. William Struckman, Savage, MT 59262
18. George Rice, Jr., Intake Rt., Glendive, MT 59330
19. Mildred K. Allard Spithoven, Savage, MT 59262
20. Marjorie M. Murray, Rt. 2, Box 364, Savage, MT 59262
21. Elwin Prevost, Rt. 2, Box 315, Savage, MT 59262
22. Sharon P. Allard, 1408 N. River Ave., Glendive, MT 59330
23. Richard L. Allard, Rt. 2, Box 3078A, Forsyth, MT 59327
24. Verna Allard, 1408 N. River Ave., Glendive, MT 59330
25. Eugene P. Allard, 2733 Miles Ave., Billings, MT 59102
26. Rodney L. Sturgis, RR 2, Savage, MT 59262
27. Rich Brasch, Supervisor, DNRC Hydro Sciences Section (hand-deliver)
28. Manager, Water Rights Bureau Field Office, Glasgow, MT (inter-departmental mail)
29. Gary Fritz, Administrator, Water Resources Division (hand-deliver)

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

**CASE #**

**50272**

by

Sally Martinez

STATE OF MONTANA                    )  
  ) ss.  
County of Lewis & Clark )

On this 5<sup>th</sup> day of December, 1986, before me, a Notary Public in and for said state, personally appeared Sally Martinez, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.



Notary Public for the State of Montana  
Residing at Helena, Montana  
My Commission expires 12-1-1987

**CASE # 50272**



BEFORE THE DEPARTMENT  
OF NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT ) INTERLOCUTORY ORDER  
NO. 50272-g42M BY JOSEPH F. )  
CRISAFULLI )

\* \* \* \* \*

Pursuant to the Montana Water Use Act, MCA Title 85, Chapter 2, and to the Montana Administrative Procedures Act, MCA Title 2, Chapter 4, Part 6, a hearing in the above-entitled matter was held on March 29, 1984, in Glendive, Montana.

I. STATEMENT OF CASE

A. Parties

The Applicant, Joseph F. Crisafulli, appeared personally and was represented by counsel, Steven J. Shapiro.

The following objectors are members of the Burns Creek Water Users Association, and were personally present as well as represented by counsel Peter Maltese: Basta Ranches, by James A. Basta; Lawrence R. Sturgis; Hatfield & Raudsep, Inc., by Robert Hubing; Lewis C. Murray; Robert Hubing, Inc., by Robert Hubing; Theodore Johnson; Monte & Marie Jarvis; Barone Ranch, Inc.; Tom Hafele; Joe Micheletto; M.L. Murray; Herbert F. Allard; Fred, Warren and Walter Prevost; George Rice; Mildred K. Allard Spithoven; Marjorie M. Murray; Elvin Prevost; Sharon P. Allard; Richard L. Allard; Verna Allard; Eugene P. Allard; Rodney L. Sturgis.

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Objectors William Struckman, Lester H. Miller and Emil Diede, Inc., did not appear either personally or by representative.

B. Exhibits

The Objectors offered the following exhibits into the record:

Objectors 1 - portions of photocopies of what appear to be United States Geological Survey (hereafter, "USGS") topographic maps depicting Burns Creek and adjacent lands from Section 32, Township 20 North, Range 56 East, Dawson County, south and east to Section 35, Township 19 North, Range 56 East, Richland County, Montana. Objectors' land ownership, and various stream flow measurements, and sundry other descriptive places are depicted thereon. The exhibit was offered for the purpose of showing the relative locations of land owned by Objectors and Burns Creek, and for determining the relative elevations of the lands owned by various parties.

Objectors 2 - 4 pictures, taken by Rodney Sturgis, depicting his spring in July 1983, and the nearby creek bottom July 1983, along with an aerial photograph of Section 10, Township 19 North, Range 56 East, all mounted on a piece of cardboard.

Objectors 3 - an aerial photograph of Burns Lake and the area Mr. Prevost testified that he tried to irrigate from the lake.

All of the Objectors' exhibits were received into evidence without objection.

The objectors also attempted to introduce into evidence a report regarding water flow measurements of South Fork of Burns Creek. Because the author of the report, a civil engineer named

Mr. Mestas, was not available for cross examination, the Applicant objected to its admission. The objection was sustained to protect the Applicant's right of cross-examination. Hert v. J.J. Newberry, 178 Mont. 355, 584 P.2d 656, rehearing denied 587 P.2d 11 (1980).

The Applicant moved for admission into the record of the entire contents of the file in the possession of the Department. The file was admitted without objection. For convenience in reference, the following documents will be referred to as Department exhibits.

Department Exhibit 1 - Geohydrology Report on the Crisafulli Application, Appropriation Number 50272, Dawson County, by Paul Lemire, Dated August 12, 1983.

Department Exhibit 2 - Memorandum from Lee Yelin to Vivian Lighthizer re: Field Investigation on Application for Beneficial Water Use Permit (Form 600) File No. 50272 for Joseph Crisafulli, dated May 20, 1983.

Department Exhibit 3 - letter to Lee Yelin from Mike Carlson, District Conservationist, United States Department of Agriculture, Soil Conservation Service dated June 1, 1983.

#### C. Case

The Applicant seeks to appropriate, by means of a 50 or 60 foot deep well, 1000 gallons per minute (hereafter, "gpm") up to 455 acre-feet per year between April 1 and October 1 of each

year, at a diversion point on the E $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 10, Township 19 North, Range 56 East, Dawson County, Montana. The water would be used for flood and sprinkler irrigation of alfalfa and grass on 150 acres - 54 acres in the S $\frac{1}{2}$ NE $\frac{1}{4}$  of Section 10, Township 19 North, Range 56 East, and 96 acres in the SE $\frac{1}{4}$  Section 10, Township 19 North, Range 56 East, all in Dawson County, Montana.

The Objectors are users of Burns Creek, most of whom also have various springs and wells for stockwater, irrigation and domestic uses.

The Objectors allege and complain generally that there exists no unappropriated water in the amount the Applicant seeks to appropriate. Further, they allege that the Applicant's pumping from a well 50-100 feet from Burns Creek would adversely affect the Creek by actually drawing water from the Creek. That is, the geology of the area, and the visible gravel layers, indicate that the subsurface water is hydrologically connected to the surface flows of the creek. Thus, the Applicant's pumping is alleged to affect the Creek flow by robbing the Creek of water that would otherwise contribute to Burns Creek. Testimony varied regarding the amount of drawdown the Creek could withstand before adverse affect would occur. Generally, the Objectors ranged between alleging that any amount of drawdown would prevent the exercise of their rights, to alleging that a drawdown of two feet would be adverse affect.

D. Preliminary Matters

1. The Applicant originally sought to flood irrigate the entire 150 acres involved in the Application. After receiving the Field Investigation Memorandum prepared by Lee Yelin, wherein Mr. Yelin advised that part of the area would more feasibly be irrigated by a side roll sprinkler rather than flood irrigation, Mr. Crisafulli amended his Application to include some sprinkler and some flood irrigating.

Without prior notice to the Department or the Objectors, Mr. Crisafulli prepared his hearing evidence on the basis of a plan to sprinkle irrigate approximately 55 acres, and to flood approximately 72 acres. The Objectors objected to this eleventh hour amendment on the basis of unfair surprise, or lack of adequate notice. The Hearing Examiner overruled the objection and hereby affirms same.

The Objectors' evidence consisted of lay witness testimony, not expert testimony, and did not encompass the affects of run off, net depletion, exact crop requirements, soil analyses, or the like. Had they known the Applicant contemplated partial sprinkler and partial flooding, their evidence would more likely than not have been the same. That is, the evidence they presented was not so technical and specific to the flood irrigation method that any prejudice accrued to their case by their lack of notice of the amendment.<sup>1</sup>

<sup>1</sup> This is not to imply that lay witness testimony is not entitled to serious consideration. Testimony of a witness which is based on familiarity with the land is, on the contrary, entitled to great weight. Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939).

Further, because of the disposition of the matter herein, the Objectors will have another chance to present factual evidence at the termination of the Interim Permit and consideration of issuance of a Provisional Permit.

Significantly, the amount applied for, period of use, place of use, source of water, etc. all remained the same, despite Mr. Crisafulli's amended project design.

2. The Applicant attempted to testify as to the oral declarations of seismograph crew personnel working in the area near his proposed well site. He sought to introduce, for the truth of the matter asserted, evidence of an out of court statement made to him regarding the probable extent of the underground aquifer in the area. The Objectors objected to the introduction of this evidence as hearsay, and the objection was sustained for the same reason Applicant's objection to the introduction of the Mestas report was sustained. (See, discussion on top of page 3).

Although the Applicant may have thus been precluded from introducing evidence contradicting that of the Department staff expert, Paul Lemire, the right to cross-examine the declarant could easily have been preserved had the Applicant produced the declarant for the hearing.

Based upon the record herein, the Hearings Examiner hereby makes the following Proposed:

## II. FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter herein, and the parties hereto, whether or not they appeared at the hearing.

2. The Application was regularly filed with the Department on October 5, 1982 at 2:55 p.m.

3. The Applicant has a bona fide intent to appropriate water pursuant to a fixed and definite plan, and is not attempting to speculate in the water resource.

4. The Applicant intends to use water for irrigation of approximately 150 acres of alfalfa and grass.

5. The source of water for Applicant's project is subsurface water flowing underground in the aquifer underlying Burns Creek in Section 10, Township 19 North, Range 56 East. Testimony of Paul Lemire; Dept. Exh. 1).

6. The aquifer water which the Applicant seeks to tap is hydrologically connected to the surface water of Burns Creek. (Testimony of Paul Lemire; Dept. Exh. 1).

7. The proposed means of diversion, construction and operation of the appropriative works are reasonable and customary for the intended use. The Applicant proposed to pump water from a 50 to 60 foot well, then transport the water by means of pipelines to a sprinkler system covering approximately 55 acres to the north of the well, as well as a sprinkling system on a smaller field (less than half the size of the northern field) to the south of the well. Further, he proposes to flood irrigate

the more level area of approximately 72 acres immediately to the north and south of the well, by means of ditches and gated pipes.

8. The plan of use is not the most efficient plan possible. (Testimony of Lee Yelin; Mike Carlson).

9. The Applicant intends to test pump the well prior to incurring the expense of obtaining the full irrigation complement. (Testimony of Joseph Crisafulli).

10. The following Objectors testified at the hearing: Leroy Sturgis, Adam Buxbaum, Jim Basta, and Robert Hubing on behalf of Hatfield & Raudsep, Inc. All of these Objectors have filed Statements of Claim for Existing Water Rights in the Water Courts of the State of Montana, evidencing various stock-water rights from Burns Creek, as well as from numerous springs and wells in the area.

11. The appropriators in closest proximity to the Applicant's proposed well site are Sturgis, Jarvis, Hubing, Hatfield & Raudsep, Inc., and Sharon Allard.

12. Applicant's pumping will have some drawdown effect on Burns Creek. (Testimony of Paul Lemire)

13. Applicant's pumping will create a "cone of depression" which will lower the aquifer level in a conical (from a cross section) shape with the pump being the deepest part of the cone. (Dept. exh. 1)

14. The feasibility of the project (as initially proposed) was questioned in reports by Mike Carlson and Lee Yelin. The



criticism centered on the slopes of the land to be irrigated. In response thereto, the Applicant amended his Application to include spinkler irrigation of those fields considered possibly too uneven to flood irrigate efficiently.

15. Because the water source is the alluvial aquifer, the cone of depression created by Applicant's pumping would not extend beyond the alluvial aquifer which generally follows Burns Creek. (Testimony of Paul Lemire).

16. Because subsurface water generally flows in the direction of the surface water with which it is connected, and because surface water generally flows downhill, the Objectors upstream and not within any reasonably projected cone of depression (created by the proposed well) will not be affected by the Applicant's pumping. These objectors are M.L. Murray, Millard K. Allard Spithoven, Sharon P. Allard.

17. Objectors whose rights derive from points of use and diversion upstream in North Fork Burns Creek, similarly, will not be adversely affected.

18. The cone of depression will be reduced proportionately to the amount of hydrologic connection between the well and the surface flow of Burns Creek. (Testimony of Paul Lemire)

19. The extent of connection between Burns Creek and the aquifer is unknown.

20. No evidence was presented to predict the amount of stream depletion which could result from pumping.

21. The records on file with the Department show a SB76 claim in the name of Lawrence Sturgis No. 42M-W-049191: the

claimed water right is for irrigation use from Burns Creek to irrigate 8 acres with volume claimed at 12 acre-feet per year. The place of use and points of diversion claimed are all in Section 4, Township 19 North, Range 56 East, Dawson County, Montana. Thus, this right is north of the Applicant's proposed well and use, and will not be affected thereby. The records also reflect various stockwater springs claimed, but as with the irrigation right, being north of the project well, they will not be affected. (Testimony Mr. Sturgis, Paul Lemire).

22. The Sturgis' stockwater spring may be affected by the Applicant's pumping, as it is also on Section 10, Township 19 North, Range 56 East, Dawson County. The effects can be monitored through proper installation of monitoring devices.

23. The Department records reflect no filings by Sturgis claiming irrigation rights by means of subirrigation.

24. The Department records reflect a SB76 No. 42M-W-122116-00 in the name of Monte & Marie Jarvis for irrigation water from Burns Creek in the amount of 260 acre-feet per year, to irrigate 130 acres in Sections 14 and 13 by means of diversion points at NE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$  and NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$  Section 14, Township 19 North, Range 56 East, Dawson County, with a claimed priority date of August 1, 1983.<sup>2</sup>

<sup>2</sup> Unless otherwise noted, all legal land descriptions refer to sections of land in Township 19 North, Range 56 East, Dawson County, Montana.

25. The Department records also reflect the Jarvis claimed water right for stockwater out of Burns Creek in Section 11 to water 150 head of cattle with a flow rate of 20 gpm and volume 93.4 acre-feet per year.

26. The extent of the Jarvis irrigation right, Claim No. 42M-W-122116-00, is unknown. The right apparently may not have been perfected to its full claimed volume; at any rate, its recent beneficial use is for 12 acres, rather than 130 acres. (Testimony Adam Buxbaum).

27. The Jarvis' stockwater and irrigation rights would be adversely affected by some measure of draw-down of Burns Creek. The amount of depletion which would adversely affect their water rights is unclear.

28. If the South Fork of Burns Creek is depleted to the extent that it ceases to flow, in areas where it historically flows above the ground, the prior appropriators will not be able reasonably to exercise their stockwater rights. (Testimony Adam Buxbaum).

29. Although Mr. James Basta testified that he had an old irrigation right, a search of the Department records for filed claims under the names of James A. Basta and Basta Ranches, Inc., failed to disclose any filings other than those for stockwater and domestic uses.

30. Hatfield & Raudsep, Inc. has filed numerous Statements of Claims, No. 42M-W-102496-00 (an irrigation claim) being the most proximate right to the use proposed herein. The points of use and diversion are upstream from the proposed use, however, and therefore no effect is likely.

31. All downstream Objectors who are prior appropriators from Burns Creek will be adversely affected if the stream depletion resulting from Applicant's use causes the Creek to stop flowing. Those are: Jarvis, Buxbaum, Basta Ranches, Prevost, Rice, Miller, Etzel.

32. There are unappropriated waters in the source of supply at times when the water can be put to the use proposed by the Applicant and throughout the period during which the Applicant seeks to appropriate.

Wherefore, based upon the foregoing Findings of Fact and the record of proceedings herein, the Hearing Examiner hereby makes the following Proposed:

### III. CONCLUSIONS OF LAW

1. The Department has jurisdiction over the parties and over the subject matter herein.

2. The Department gave proper notice of the hearing and all relevant substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter was properly before the Hearing Examiner.

3. § 85-3-311 MCA (1983) directs the Department to issue a permit "if the applicant proves by substantial credible evidence that the following criteria are met":

(a) there are unappropriated waters in the source of supply:

(i) at times when the water can be put to the use proposed by the applicant,

- (ii) throughout the period during which the applicant seeks to appropriate,
- (iii) throughout the period during which the applicant seeks to appropriate the amount requested is available;
- (b) the water rights of a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial one;
- (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

4. Objectors William Struckman, Lester Miller, and Emil Diede, Inc., not having appeared at the hearing either personally or by representative, are in default pursuant to Administrative Rules of Montana (hereafter, "ARM") § 36.12.208, MAR p.697 (effective 4/27/84).

5. The water the Applicant seeks to appropriate is not groundwater within the meaning of the Water Use Act, because it is hydrologically connected with the surface waters of Burns Creek.<sup>4</sup> (Testimony of Paul Lemire; Robert Hubing).

<sup>4</sup> "Groundwater" means any water beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water, and which is not a part of that surface waters. § 85-2-102(8) MCA 1983 (emphasis added). See, In the Matter of the Application for Beneficial Water Use Permit No. 14,965-g41E and Application for Change of Appropriation Water Right No. 19,230-c41E by Thomas H. Boone, Trustee, Final Decision May 21, 1981.

6. The Department has the authority to issue an Interim Permit authorizing an applicant to begin appropriating water immediately. Administrative Rules of Montana, § 36.12.104.

7. The Applicant has adduced substantial credible evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate.

8. The proposed use is a beneficial use, and will not result in a waste of the water resource.

9. The economic rate of return is not subject to Department scrutiny except to the extent that the proposed use of water is actually wasteful. The scope of waste is bounded by the limits of beneficial use. Because a water right is measured by the need created by the particular beneficial use, any appropriation greater than that which is needed for the use, is waste. Waste may be prevented by the Department. § 85-2-114 MCA 1983. Waste is defined as "unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application greater to anything but a beneficial use." § 85-2-102(13) MCA (1983). The Department tests an application for economic benefits only to the extent that lack of economic benefit is indicative of waste.

Where the legislature intends the Department to make findings on the economic benefits of an appropriation, it expressly so states. See, § 85-2-311(2) MCA 1983.

10. The Applicant's method of use need not be the most efficient, it need only be reasonable one. State ex rel. Crowley v. District Court, 108 Mont. 89, 88 P.2d 23 (1939); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939).

11. The testimony of lay witnesses is to be given great weight where the witnesses have long-standing familiarity with the area in issue, and have farmed thereon for many years. Worden v. Alexander, supra.

12. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

13. There is substantial evidence that the criteria for issuing a regular permit will be met. Therefore the Department has the authority to issue an Interim Permit to the Applicant herein. ARM § 36.12.104.

14. The Applicant has applied for a permit to appropriate water for irrigation use. Any subsequent change in purpose of use cannot be made unless approved by the Department. § 85-2-402(1) MCA (1983).

15. The issuance of an Interim Permit does not entitle the Applicant to a provisional permit. To be entitled to a provisional permit, he is still under a duty to show that which remains uncertain, i.e.: a) the appropriation will not adversely affect the water rights of a prior appropriator; and b) the amount of available unappropriated water.

16. The remainder of the statutory criteria, with the exception of § 85-2-311(1)(a), (b), have been proved by substantial credible evidence, and need not be addressed at the review stage necessary prior to the issuance of a regular permit. See, In the Matter of the Application for Beneficial Water Use Permit by Donald H. Chaffee No. 34,204-s42M.

17. The purpose of the Interim Permit is to allow the Applicant to begin a testing period, to include actual withdrawal and application to beneficial use, of the water for which the Permit is sought. Because of the uncertainty regarding the amount actually available and the extent of stream depletion, and because the Applicant testified that he intended to test pump anyway, the grant of an Interim Permit is appropriate herein. The Applicant is thereby authorized to gather the data, which is unobtainable by any other means, necessary for him to show the existence of the statutory criteria for provisional permit issuance.

Wherefore, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following Proposed:

ORDER

That subject to the terms, conditions, restrictions and limitations listed below, an Interim Permit is hereby granted to Joseph F. Crisafulli to appropriate by means of a well, 1,000 gpm up to 455 acre-feet per year between April 1 and October 1 of each year, at a diversion point in the E $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 10, Township 19 North, Range 56 East, Dawson County, Montana. The water is to be used for flood and sprinkler irrigation of alfalfa and grass on approximately 150 acres: 54 acres in the S $\frac{1}{2}$ NE $\frac{1}{4}$  of Section 10, Township 19 North, Range 56 East, and 96 acres in the SE $\frac{1}{4}$  of Section 10, Township 19 North, Range 56 East, all in Dawson County, Montana. The source of supply is subsurface water:



A. The Applicant shall, prior to installation of his diversion works, install two surface flow monitoring devices in Burns Creek; one upstream from the closest point in the stream to the well, and one downstream therefrom. The type of device used, and the installation and exact placement as well as procedures for keeping adequate records of Burns Creek flow thereof shall be subject to the supervision and approval of Paul Lemire and his delegees.

B. The Permittee shall install a flow meter on the pipe leading from the well and capable of measuring length of time pumped and amounts of water flow pumped.

C. The Permittee shall keep a written record of the flow rate and volume of all waters withdrawn, including the times of pumping, and shall make these records available to the Department upon request.

D. This permit is subject to Section 85-2-505, MCA, (1983) requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of the water may be stopped when not being put to beneficial use.

E. This permit is subject to all prior existing water rights in the source of supply. Further; this permit is subject to any final determination of existing water rights, as provided by law.

F. The issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by

Permittee's exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

G. This Interim Permit shall be valid through October 1, 1986, for purposes of testing the effects of Permittee's pumping on Burns Creek, and for determining the amount of water available in the source.

H. If at any time after this Interim Permit is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the applicant to show cause why the permit should not be modified or revoked. The Department may then modify or revoke the permit to protect existing rights or allow the permit to continue unchanged if the Hearings Officer determines that no existing water rights are being adversely affected.

I. The Glasgow Water Rights Bureau Field Office, under the supervision of Paul Lemire or his delegee, shall conduct periodic checks during times when the Permittee is appropriating water pursuant hereto, to determine adequacy of the monitoring devices, and visible affects from pumping on Burns Creek and senior appropriators in the vicinity.

DONE this 11<sup>th</sup> day of September, 1984.

Sarah A. Bond  
Sarah A. Bond, Hearing Examiner  
Department of Natural Resources  
and Conservation  
32 S. Ewing, Helena, MT 59620  
(406) 444 - 6625

#### NOTICE

After expiration of the Interim Permit, another review will be held on the issues of adverse affect and water availability wherein the Applicant and Objectors will present further evidence thereon. After presentation of evidence, the Hearing Examiner will prepare a Proposal for Decision to which all parties will have an opportunity to present exceptions and request further oral argument before a final Departmental decision herein.

#### MEMORANDUM

An Interim Permit is appropriate herein for the reasons stated in the Proposal. Although it is clear that some subsurface water is available for appropriation, the affect on Burns Creek and the actual amount available remain to be determined. Little detriment will accrue to the Objectors, as the grant of an Interim Permit does not automatically entitle the Applicant to the Provisional Permit sought. Indeed, the Applicant may choose to forego exercise of the Interim Permit,

and terminate his participation herein, due to the expense involved in the monitoring plan. Nevertheless, the Department cannot issue the permit on the record herein, due to the complete lack of credible data on the probable affects on Burns Creek from the proposed use.

The Applicant has failed to sustain his burden of proof regarding adverse affect. This proof may be adduced by the data gathered in the test period however, and the Hearing Examiner believes the Applicant is entitled to the Interim Permit necessary to make his proof. The expert testimony of Paul Lemire indicated the only reliable means of predicting stream depletion was to begin pumping and monitor the affects on Burns Creek. Hence, it is more likely than not that this is the sole means by which the Applicant can satisfy his burden of proof, and because of his showing regarding the other statutory criteria, and that it is likely that the criteria will be met for some appropriation (albeit possibly not for the full volume sought), he is entitled to an Interim Permit.

After the termination of the Interim Permit, the Department will hold another hearing to allow presentation of the evidence gathered during the test period. Because of the findings made herein, the evidence may be limited to that regarding adverse affect to other appropriators, and water availability.

Although the numerous water rights of the numerous Objectors herein have not been defined exactly herein, the scope of those Objectors rights cannot truely be determined. The predominant use of North Fork is for stockwater, and these rights were exempt

from the SB76 filing procedure. So, although most Objectors filed these rights, the SB76 claims may not be determinative of the entire rights of the Objectors. Such a determination necessarily must await a final decree on Burns Creek.

Nevertheless, the uncertainty of those rights does not affect this disposition, as the criteria for issuance of an Interim Permit have clearly been met. Further, the issues left for determination, prior to issuance of a Provisional Permit herein, include adverse affect to the prior appropriators, and, assuming the Applicant chooses to comply herewith, the issues of the extent of Objectors' rights can be clarified at the next hearing, (or other evidence gathering forum) wherein the data gathered during the Interim Permit phase will be presented to the Department for decision on whether a Provisional Permit may issue.

AFFIDAVIT OF SERVICE

STATE OF MONTANA                    )  
  ) ss.  
County of Lewis & Clark )

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on September 13, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by Joseph F. Crisafulli, Application No. 50272-g42M, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Joseph F. Crisafulli, box 1354, Glendive, MT 59330
2. Basta Ranches, James A. Basta, Rt. 2, Box 331, Savage, MT 59262
3. Lawrence R. Sturgis, 500 Grant, Glendive, MT 59330
4. Hatfield & Raudsep, Inc., Leida E. Hubing, Pres., Savage, MT 59262
5. Lester H. Miller, Rt. 2, Box 300, Savage, MT 59262
6. Lewis C. Murray, Savage, MT 59262
7. Joe Michelett, Rt. 2, Box 235, Savage, MT 59262
8. Robert Hubing, Inc., c/o Robert Hubing, Savage, MT 59262
9. Theodore Johnson, 104 South Rosser Ave., Glendive, MT 59330
10. Marie & Monte Jarvis, 607 E. Dodge St., Glendive, MT 59330
11. Emil Diede, Inc., Emil Diede, Pres., Savage, MT 59262
12. Barone Ranch, Inc., Douglas E. Barone, Box 555, Glendive, MT 59330
13. Tom Hafele, Intake Rt., Glendive, MT 59330
14. M.L. Murray, Box 193, Lambert, MT 59243
15. Herbert F. Allard, Savage, MT 59262
16. Fred, Warren & Walter Prevost, Intake Rt., Glendive, MT 59330
17. William Struckman, Savage, MT 59262
18. George Rice, Jr., Intake Route, Glendive, MT 59330
19. Mildred K. Allard Spithoven, Savage, MT 59262
20. Marjorie M. Murray, Rt. 2, Box 364, Savage, MT 59262
21. Elwin Prevost, Rt. 2, Box 315, Savage, MT 59262
22. Sharon P. Allard, 1408 N. River Avenue, Glendive, MT 59330
23. Richard L. Allard, Rt. 2, Box 3078A, Forsyth, MT 59327
24. Verna Allard, 1408 N. River Ave., Glendive, MT 59330
25. Eugene P. Allard, 2733 Miles Avenue, Billings, MT 59102
26. Rodney L. Sturgis, RR 2, Savage, MT 59262
27. Lee Yelin, Water Rights Technician (inter-departmental mail)
28. Paul Lemire, Geohydrologist (hand deliver)

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29. Vivian Lighthizer, Water Rights Bureau Field Office, Glasgow  
(inter-departmental mail)  
30. Sarah A. Bond, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Donna K. Elser

STATE OF MONTANA                    )  
  ) ss.  
County of Lewis & Clark )

On this 13<sup>th</sup> day of September, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Nedra Kohn  
Notary Public for the State of Montana  
Residing at Montana City, Montana  
My Commission expires 3-1-85

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